FILED BY CLERK
JAN -8 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FIVE POINTS HOTEL PARTNERSHIP, Plaintiff/Appellant, v. FIRST ARIZONA TITLE AGENCY, LLC, Defendant/Appellee,	)	2 CA-CV 2009-0089 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200501706

Honorable Robert Carter Olson, Judge

DISMISSED

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B R A M M E R, Judge.

¶1 Five Points Hotel Partnership (Five Points) appeals the trial court's judgment in favor of First Arizona Title Agency, LLC[1] (FATA) on Five Points's claim of breach of fiduciary duty. Because the trial court erred when it certified the judgment as appealable pursuant to Rule 54(b), Ariz. R. Civ. P., we dismiss the appeal for lack of jurisdiction.

Factual and Procedural Background

¶2 The relevant facts are undisputed. In March 2005, Five Points and Casa Grande Resort Living, LLC (CGRL) agreed that CGRL would purchase a hotel from Five Points (Purchase Agreement). CGRL and Five Points also agreed that CGRL would resell or refinance the hotel soon after the sale. Before CGRL's resale or refinancing of the hotel, CGRL was to have use of certain hotel operating accounts, including bond reserve accounts.

¶3 According to the Purchase Agreement, after CGRL sold or refinanced the hotel, the parties would reconcile the accounts retroactively to February 28, 2005. The agreement describes this process as a "second closing." Before entering into the March 2005 Purchase Agreement, CGRL and Five Points executed escrow instructions with FATA that describe the second closing and the reconciliation of accounts, and—unlike the Purchase Agreement—specify that FATA was to administer the reconciliation of accounts and make any disbursements.

[1]At the time this action was filed, FATA was known as TSA Title Agency, LLC.

¶4 CGRL then found a buyer for the hotel and, again using FATA as the escrow agent, resold the hotel in June 2005. FATA distributed the proceeds of the sale to CGRL without conducting either the second closing or the reconciliation of accounts. Five Points then filed this action against both CGRL and FATA, asserting against CGRL claims for breach of contract, breach of the duty of good faith and fair dealing, fraud, and negligent misrepresentation, and against FATA claims it had breached its fiduciary duty to execute the second closing and reconciliation of accounts.[2]

¶5 FATA filed a motion for summary judgment, arguing the Purchase Agreement was an integrated contract and, because it did not require FATA to administer the second closing, FATA did not breach the fiduciary duty it owed to Five Points. The trial court agreed, noting it was undisputed "that FATA had no authority to force the reconciliation to occur nor any ability to prevent the second sale from occurring." Thus, the court concluded, "[FATA] is entitled to a judg[]ment as a matter of law." The court entered a "final judgment . . . pursuant to Rule 54(b), Ariz. R. Civ. P.," in favor of FATA on Five Points's claim against it. This appeal followed.

[2]Five Points's amended complaint also included claims not relevant to this appeal against two of Five Points's partners. Another claim against FATA by Paragon Hotel Corporation, Five Points's managing partner, was dismissed pursuant to stipulation and Paragon is not a party to this appeal. CGRL counterclaimed against Five Points for breach of contract and breach of the covenant of good faith and fair dealing.

Discussion

¶6 Although the parties agree we have jurisdiction to consider this appeal,[3] we have "the duty to review [our] jurisdiction and, if jurisdiction is lacking, to dismiss the appeal." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991); *cf. Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981) ("Even though the parties do not raise the issue, the appellate court must determine that it has jurisdiction."). Our jurisdiction generally is "limited to final judgments which dispose of all claims and all parties." *Musa*, 130 Ariz. at 312, 636 P.2d at 90; *see also* A.R.S. § 12-2101(B). Plainly, there remain numerous claims unresolved by the judgment, and because they are still pending, the judgment here is not final as to all claims and parties.

¶7 Pursuant to Rule 54(b), however, a trial court may render appealable an otherwise interlocutory judgment if it enters a "final judgment as to one or more but fewer than all of the claims or parties," "express[ly] determin[es] that there is no just reason for delay and . . . express[ly] direct[s] . . . the entry of judgment." "[T]he determination of whether multiple claims exist lies within the sound discretion of the trial court."[4] *Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 191, 635 P.2d 174, 176 (1981).

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[3]Pursuant to our order, the parties submitted a joint supplemental brief on the issue of jurisdiction.

[4]Several Arizona appellate decisions have stated we review de novo a trial court's determination that a judgment fully disposes of a separate claim. *See Kim v. Mansoori*, 214 Ariz. 457, ¶ 6, 153 P.3d 1086, 1088 (App. 2007); *Davis*, 168 Ariz. at 304, 812 P.2d at 1122; *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 189 Ariz. 369, 373, 943 P.2d 729, 733 (App. 1996). This recitation of the standard of review is inconsistent with our supreme court's statement in *Continental Casualty*.

Rule 54(b) certification, however, must be applied sparingly, *see id.*, and "d[oes] not change the rule against deciding appellate cases in a piecemeal fashion." *Davis*, 168 Ariz. at 304, 812 P.2d at 1122.

¶8 As we noted above, the signed judgment in FATA's favor stated it was a "final judgment, as to the claims of [Five Points] against [FATA], pursuant to Rule 54(b), Ariz. R. Civ. P."[5] But Rule 54(b) certification "does not give this court jurisdiction to decide an appeal if the judgment in fact is not final, i.e., did not dispose of at least one separate claim of a multi-claim action." *Davis*, 168 Ariz. at 304, 812 P.2d at 1122. "[A] claim is separable from others remaining to be adjudicated when the nature of the claim already determined is 'such that no appellate court would have to decide the same issues more than once even if there are subsequent appeals.'" *Cont'l Cas.*, 130 Ariz. at 191, 635 P.2d at 176, *quoting Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980).

¶9 In granting summary judgment, the trial court determined the escrow instructions were superseded entirely by the later Purchase Agreement. These two contracts formed not only the basis of the dispute between Five Points and FATA, but also the basis of the dispute between Five Points and CGRL. Five Points alleged in its complaint that CGRL had violated both the Purchase Agreement and escrow instructions. As FATA points out in its answering brief, the terms of these two contracts differ

[5]We assume, without deciding, that this statement is sufficient to certify a judgment under Rule 54(b), Ariz. R. Civ. P. We observe, however, that the rule requires an "express" finding there is no just reason for delay and we question whether mere reference to the rule reasonably can be interpreted as the express finding the rule requires.

significantly. For example, the escrow instructions state the reserve accounts were to be "transferred to [CGRL] gratis," but the Purchase Agreement provides the "net balance" of the accounts "shall be settled in cash between the parties with a net liability being payable to [CGRL] and a net asset being payable to Five [Points]." The Purchase Agreement and escrow instructions also identify different accounts that were to be part of the second closing. They also differ with respect to which party was to be responsible for certain property taxes. And the Purchase Agreement and escrow instructions also contain different closing dates.

¶10 For these reasons, whether the escrow instructions were entirely superseded by the Purchase Agreement or whether those contracts must be read together is an issue plainly relevant to both disputes; after the claims between CGRL and Five Points are resolved, it is an issue likely to arise in any subsequent appeal. *See Cont'l Cas.*, 130 Ariz. at 191, 635 P.2d at 176. Thus, the test articulated in *Continental Casualty* has not been met. Although we find few decisions addressing a comparable situation, the Alabama Court of Appeals twice reached the same conclusion in similar circumstances. *See BB&S Gen. Contractors, Inc. v. Thornton & Assocs., Inc.*, 979 So. 2d 121, 125 (Ala. Civ. App. 2007) (setting aside Rule 54(b), Ala. Civ. P., certification because claims depended on "the proper interpretation of the contract"); *Ann Corp. v. Aerostar World, Inc.*, 781 So. 2d 231, 234 (Ala. Civ. App. 2000) (Rule 54(b) certification improper because complaint and counterclaim "allege a breach of the same contract"). We find no

authority establishing certification under Rule 54(b) was appropriate in circumstances similar to those present here.

¶11 The parties assert, however, that Rule 54(b), Ariz. R. Civ. P., certification was appropriate here because "the remaining claims [Five Points] has against other defendants can be enforced independently of the claims between" Five Points and FATA. Even assuming the claims are enforceable separately,[6] that fact does not determine whether certification under Rule 54(b) was appropriate. The parties rely on *Salerno v. Atlantic Mutual Insurance Co.*, 198 Ariz. 54, 57-58, 6 P.3d 758, 761-62 (App. 2000), in which this court stated, "'[t]he determination [of whether separate claims exist] rests on whether the different claims could be separately enforced,'" *quoting Sisemore v. Farmers Ins. Co. of Ariz.*, 161 Ariz. 564, 566, 779 P.2d 1303, 1305 (App. 1989). First, nothing in that case suggests the claims addressed there would be dependent on interpretation of the same contract. *See id.* Second, the language used in *Salerno* and *Sisemore* is taken from *Stevens v. Mehagian's Home Furnishings, Inc.*, 90 Ariz. 42, 365 P.2d 208 (1961). *See Sisemore*, 161 Ariz. at 566, 779 P.2d at 1305. *Continental Casualty*, decided twenty years after *Stevens*, is our supreme court's more recent articulation of the applicable standard. Thus, even if claims are enforceable separately, they are only separate claims under Rule 54(b) "if the nature of the claim already determined is 'such that no appellate court would have to decide the same issues more than once even if there are subsequent

[6]The parties offer no analysis, explanation, or authority to support this conclusion.

appeals.'" *Cont'l Cas.*, 130 Ariz. at 191, 635 P.2d at 176, *quoting Curtiss-Wright Corp.*, 446 U.S. at 8.

¶12 Finally, the parties' assertion that "[a]ll of the remaining claims have proceeded separately to trial, without [FATA's] participation, and resulted in judgments for [Five Points] and against the other parties" is of no moment.[7] Nothing in that statement suggests the issue decided by the trial court—whether the Purchase Agreement supersedes the escrow instructions—could not be raised in an appeal from those ostensible judgments. Accordingly, for the reasons stated, the trial court had no discretion to certify the judgment as appealable under Rule 54(b) and we therefore lack jurisdiction over this appeal.

Disposition

¶13 Because we lack jurisdiction over this appeal, we dismiss it.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

[7]Nothing in the record on appeal before us supports this assertion.